

FLORIDA TRIBE OF EASTERN CREEK INDIANS  
v.  
DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 85-33-A

Decided October 10, 1985

Appeal from a decision of the Deputy Assistant Secretary--Indian Affairs (Operations) concerning distribution of residual funds in Indian Claims Commission Docket 21.

Dismissed.

1. Board of Indian Appeals: Jurisdiction--Constitutional Law:  
Generally

The Board of Indian Appeals does not have authority to declare an act of Congress unconstitutional.

2. Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs:  
Administrative Appeals: Generally

Under 43 CFR 4.331, the Board of Indian Appeals does not have jurisdiction to review a matter when there has been no final decision by an appropriate official of the Bureau of Indian Affairs.

APPEARANCES: Mary M. Callaway, Esq., and Susan Ann Bleiler, Esq., Pensacola, Florida, for appellant; George T. Skibine, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE PARRETTE

On May 13, 1985, the Board of Indian Appeals (Board) received a notice of appeal from the Florida Tribe of Eastern Creek Indians (appellant). Appellant sought review of an April 4, 1985, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) concerning distribution of residual funds in Docket 21 of the Indian Claims Commission. For the reasons discussed below, the Board holds that this appeal must be dismissed.

Background

Based on alleged takings of property belonging to the Creek Nation by the United States Government in the 1800's, several claims for reimbursement

were filed before the Indian Claims Commission. Awards were made in 10 of these cases, 2 of which are in controversy here.

Docket 21 resulted in an award to the Creek Nation on September 10, 1963. Funds were appropriated for payment of this award on April 30, 1965. A plan of distribution was provided in the Act of September 21, 1968, P.L. 90-504, 82 Stat. 855. 1/ Because unexpended funds remained in Docket 21, Congress provided for the disposition of those funds by the Act of August 21, 1984, P.L. 98-390, 98 Stat. 1356. 2/

The second award was made in Docket 272 on September 22, 1978. Funds were appropriated for payment of the award on December 11, 1978. A preliminary plan for the distribution of these funds was developed by the Bureau of Indian Affairs (BIA) and approved by the Secretary of the Interior on January 25, 1984. Apparently no distribution has been made from this docket.

On January 30, 1985, the Eastern Area Director, BIA, informed the Assistant Secretary for Indian Affairs of his decision concerning disposition of funds in Dockets 21 and 272. 3/ The memorandum indicated that the residual funds in Docket 21 would be distributed only to the Poarch Band of Creek Indians, Atmore, Alabama, and it established a distribution plan for the funds in Docket 272.

On February 28, 1985, appellant sought review of the Eastern Area Director's decision. The notice of appeal states:

We feel that since the Eastern Creek share of docket 21 funds was voted by the Eastern Creek's in 1973 to be distributed on a per capita basis that the residual monies of docket 21 should be paid out in the same manner. We feel that this is not federal money, it ceased being federal money when the court awarded this payment to the Creek Indian people.

We concur with the Eastern Area Director's ruling on docket 272 funds except that those people presently on the Poarch Band's roll who wish to remove their names from the roll and receive their per capita share of docket 272 funds, be allowed to do so.

On April 4, 1985, appellee affirmed the Eastern Area Director's decision. The present appeal was received by the Board on May 13, 1985. Briefs have been filed by both appellant and appellee. This decision is being expedited on the basis of congressional concern, expressed in letters to BIA, copies of which were provided to the Board.

#### Discussion and Conclusions

[1] On appeal, appellant raises three arguments against the proposed

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1/ See Appendix A for text of P.L. 90-504.

2/ See Appendix B for text of P.L. 98-390.

3/ This memorandum also concerned funds in Docket 275, which are not at issue in this appeal.

distribution of residual funds in Docket 21: the proposal is an unconstitutional discrimination against certain Creek Indians, namely those associated with appellant; the proposal impermissibly takes property belonging to appellant's members without just compensation; and the proposal is a breach of contract rights belonging to appellant's members. Each of these arguments essentially constitutes an attack upon the wisdom or constitutionality of P.L. 98-390, which is the basis for the distribution plan. Because the only relief sought by appellant requires a determination of the constitutionality of P.L. 98-390, and because the Board is without jurisdiction to grant this relief, that part of this appeal which attacks the distribution of residual funds in Docket 21 must be dismissed. Zarr v. Acting Deputy Director, Office of Indian Education Programs, 11 IBIA 174, 90 I.D. 172 (1983). The Board is not the proper forum to review the constitutionality of an act of Congress.

Appellant indicates for the first time in its brief to the Board that it is also challenging the planned distribution of funds in Docket 272. Appellant argues that it did not initially challenge the Area Director's plan because the problems with it were not readily apparent.

[2] Even if the Board were to find that this issue could be raised for the first time on appeal, the appeal would still have to be dismissed. The administrative record contains letters dated August 22, 1985, from appellee to the Chairman, Senate Select Committee on Indian Affairs, and members of the Florida congressional delegation dated August 22, 1985. These letters indicate that the proposed plan for the distribution of Docket 272 funds is being reconsidered because of equitable concerns. Accordingly, the plan is not final, and there is no reviewable decision before the Board. See 43 CFR 4.331. Because there is no final decision, the appeal as to Docket 272 must also be dismissed.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal from the April 4, 1985, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) is dismissed.

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Bernard V. Parrette  
Chief Administrative Judge

I concur:

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Jerry Muskrat  
Administrative Judge

APPENDIX A

P.L. 90-504 provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior shall prepare a roll of all persons who met the following requirements: (a) they were born on or prior to and were living on the date of this Act; (b) their names or the names of lineal ancestors appear on any of the documents identified herein or on any available census rolls or other records acceptable to the Secretary, which identify the person as a Creek Indian, including ancient documents or records of the United States located in the National Archives, State or county records in the archives of the several States or counties therein or in the courthouses thereof, and other records that would be admissible as evidence in an action to determine Indian lineage:

(1) The Final Rolls of Creeks by Blood which were closed as of March 4, 1907;

(2) Claims of Friendly Creeks paid under the Act of March 3, 1817 (H.R. Doc. 200,20:1, 1828);

(3) Census of the Creek Nation, 1833, made pursuant to article 2 of the treaty concluded March 24, 1832 (Senate Doc. 512, 1835, Emigration Correspondence, 1831-1833, pages 239-395);

(4) Land Location Registers of Creek Indian Lands, made pursuant to the Treaty of March 24, 1832;

(5) Any emigration or muster rolls of Creek Indians;

(6) Any lists of self-emigrant Creek claimants (including those contained in Senate Ex. Doc. 198,50:1, 1888, and H.R. Ex. Doc. 238,51:2, 1891).

Applications for enrollment must be filed with the Area Director of the Bureau of Indian Affairs, Muskogee, Oklahoma, in the manner and within the time limits prescribed for that purpose. The determination of the Secretary regarding the eligibility of an applicant shall be final.

Sec. 2. After the deduction of attorney fees, litigation expenses, the costs of distribution, and the cost of preparing the roll pursuant to section 1 of this Act, the funds, including interest, remaining to the credit of the Creek Nation as constituted August 9, 1814, which were appropriated by the Act of April 30, 1965, to pay a judgment obtained in Indian Claims Commission docket numbered 21, shall be distributed on a per capita basis to all persons whose names appear on the roll. The funds so distributed shall not be subject to Federal or State income taxes.

Sec. 3. The Secretary shall distribute a share payable to a living enrollee directly to such enrollee or in such manner as is deemed by the Secretary to be in the enrollee's best interest, and he shall distribute the per capita share of a deceased enrollee to his heirs or legatees upon proof of death and inheritance satisfactory to the Secretary, whose findings upon such proof shall be final and conclusive. Sums payable to enrollees or their heirs or legatees who are less than twenty-one years of age or who are under legal disability shall be paid to the persons who the Secretary determines will best protect their interests.

Sec. 4. The Secretary of the Interior is authorized to prescribe rules and regulations to carry out the provisions of this Act, including establishing an appropriate deadline for filing applications.

APPENDIX B

P.L. 98-390 provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, notwithstanding Public Law 90-506 and any other provision of law, any funds appropriated by Public Law 89-697 in satisfaction of a judgment awarded the Muscogee (Creek) Nation of Oklahoma in docket numbered 276 of the Indian Claims Commission which have not been distributed on the date of enactment of this Act (including all interest and investment income accrued thereon) shall be distributed by the Secretary of the Interior to the Muscogee (Creek) Nation of Oklahoma as needed to make expenditures for any plan or program authorized by ordinance of such Nation.

Sec. 2.(a) Notwithstanding Public Law 90-504 and any other provision of law, any funds appropriated by Public Law 89-16 in satisfaction of a judgment awarded the Creek Nation of Indians in docket numbered 21 of the Indian Claims Commission which have not been distributed on the date of enactment of this Act (including all interest and investment income accrued thereon) shall be used and distributed in accordance with the provisions of this section.

(b)(1) The Secretary of the Interior (hereinafter in this section referred to as the 'Secretary') shall allocate--

(A) 81.6196 per centum of the funds described in subsection (a) to the Muscogee (Creek) Nation of Oklahoma, and

(B) 18.3804 per centum of the funds described in subsection (a) to the Eastern Creeks.

(2) The funds allocated to the Muscogee (Creek) Nation of Oklahoma under paragraph (1) shall be distributed to such Nation by the Secretary as needed to make expenditures for any plan or program authorized by ordinance of such Nation.

(3)(A) The funds allocated to the Eastern Creeks under paragraph (1) shall be held in trust and invested by the Secretary for the benefit of the Eastern Creeks.

Sec. 3.(a) If one or more of the Eastern Creek entities that have filed a petition for Federal acknowledgement are acknowledged to be an Indian tribe on or before December 30, 1984, such tribe or tribes shall be deemed to be a successor entity to the original Eastern Creek group for purposes of distribution of the residual funds in docket numbered 21, and the funds held in trust for the benefit of the Eastern Creeks under section 2 of this Act (including all interest and income accrued thereon) shall be distributed to such tribe or tribes by the Secretary as needed to

make any expenditures for any plan or program authorized by ordinance or resolution of such tribe or tribes.

(b) If more than one tribal entity is recognized by the Secretary, such funds shall be prorated between the tribes on the basis of their respective base membership rolls on the date of acknowledgement.

(c) If none of the Eastern Creeks which have filed a petition for acknowledgement are recognized as an Indian tribe by the Secretary prior to December 30, 1984, the funds held in trust for the Eastern Creeks under this Act (including all interest and income accrued thereon) shall be distributed by the Secretary in the form of per capita payments in addition to any amount appropriated in satisfaction of a judgment awarded the Eastern Creeks in docket numbered 275 of the Indian Claims Commission.

Sec. 4. If Federal recognition as an Indian tribe is extended to any Eastern Creek entity prior to distribution of the funds awarded in docket numbered 272 and 275, such tribe or tribes shall be entitled to amend the existing distribution plans for these awards by filing with the Secretary an alternative distribution plan for its proportionate share of funds in these dockets."